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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT YAKIMA

PROPRIETARY VARIETY
MANAGEMENT, LLC and
WASHINGTON STATE
UNIVERSITY,

Plaintiffs,

v.

ANGEL'S GRAFTING AND
NURSERY, LUIS JORGE ANGEL, and
CINDY ELIZABETH ANGEL,

Defendants.

Case No.: 1:20-cv-3088

**COMPLAINT FOR PATENT
INFRINGEMENT**

JURY TRIAL REQUESTED

Plaintiffs Washington State University ("WSU") and Proprietary Variety Management, LLC ("PVM") (collectively, "Plaintiffs"), for their Complaint against Angel's Grafting and Nursey ("AGN"), Luis Jorge Angel, and Cindy Elizabeth Angel (collectively, "Defendants"), allege as follows:

I. INTRODUCTION

1
2 1. This case involves Defendants' willful infringement of Plaintiffs' rights
3 and interests in the patented apple cultivar known as WA 38, trees of which bear
4 apples that are marketed and sold under the COSMIC CRISP® brand. WSU owns
5 the plant patent for the WA 38 cultivar, United States Plant Patent No. 24,210 ("210
6 Patent") and has licensed PVM to commercialize WA 38, by sublicensing nurseries
7 to propagate WA 38 trees and sell them to growers, and sublicensing growers to
8 grow WA 38 trees and sell apples from those trees under the COSMIC CRISP®
9 brand. Plaintiffs have initiated this lawsuit because Defendants have infringed the
10 '210 Patent by asexually reproducing and growing WA 38 apple trees and by
11 offering to sell and selling WA 38 apple trees to unlicensed persons, all without any
12 license from WSU or PVM. PVM has repeatedly demanded that Defendants cease
13 and desist from their infringing conduct, but to no avail.

II. PARTIES

14
15 2. WSU is a state university of the State of Washington.

16 3. PVM is a Washington limited liability company with its principal place
17 of business in Yakima, Washington.

18 4. On information and belief, Defendant AGN is a partnership with its
19 principal place of business in Tieton, Washington.
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1 5. On information and belief, Defendants Luis Jorge Angel and Cindy
2 Elizabeth Angel are individuals residing in Tieton, Washington, and the partners
3 who own AGN.

4 **III. JURISDICTION AND VENUE**

5 6. The Court has subject-matter jurisdiction over this action under 28
6 U.S.C. §§ 1331 and 1338(a) and personal jurisdiction over Defendants because they
7 reside and do business within this district.

8 7. Venue is proper under 28 U.S.C. § 1400(b) because the Defendants
9 reside and have regular and established places of business in this district, and their
10 acts of infringement occurred within this district.

11 **IV. FACTUAL BACKGROUND**

12 **A. Development of the COSMIC CRISP®**

13 8. In the late 1990s, WSU Professor Bruce Barritt (“**Dr. Barritt**”) began
14 breeding work that resulted in the new apple variety now called the WA 38.
15 Dr. Barritt selected the WA 38 cultivar from thousands of seedlings that he created
16 by cross pollinating existing apple varieties. The seed for WA 38 was germinated
17 and grown in a greenhouse at a WSU facility in Wenatchee in 1998. The seedling
18 was transferred to a collaborating commercial nursery in May 1998, where it grew
19 until September 1999, when it was budded onto root stock. The resulting tree was
20 planted in WSU’s Columbia View Orchard in April 2001.

1 9. Dr. Barritt and colleagues evaluated fruit from this original budded tree
2 in 2002 and 2003. Based on the quality of that fruit, a second generation of trees was
3 created in 2004 by taking buds from the original seedling tree and propagating them
4 onto root stock. Additional trees were propagated in 2006. These trees were used for
5 larger scale plantings in 2008 at four orchard sites in central Washington.

6 10. In February 2012 Dr. Barritt filed an application with the USPTO
7 seeking a plant patent for the WA 38 apple cultivar. In February 2014 the USPTO
8 issued the '210 Patent, which discloses and claims the WA 38 apple cultivar.

9 11. A copy of the '210 Patent, which has been assigned to WSU, is attached
10 as **EXHIBIT A**.

11 12. An apple from a WA 38 apple tree is large and juicy with a firm crisp
12 texture. It provides ample sweetness and tartness, making it an excellent eating
13 apple. It is slow to brown when cut and maintains its texture and flavor in storage
14 for over a year.

15 13. With the assistance of PVM, WSU has adopted the trademark COSMIC
16 CRISP® as a brand name for use in marketing the apples produced by WA 38 apple
17 trees as well as the trees themselves and owns U.S. Trademark Reg. No. 5,330,199
18 for the trademark COSMIC CRISP® in connection with apples and apple trees.

B. PVM Oversees the Licensing of WSU's Intellectual Property

14. After the '210 Patent issued, WSU entered into a management contract with PVM in June 2014 ("**2014 Management Agreement**"), which has been amended from time to time.

15. Among its other rights and obligations under the 2014 Management Agreement, PVM has the sole authority to license nurseries to propagate and sell WA 38 trees in the United States. PVM also has the sole authority to license growers to grow WA 38 trees and sell the apples from those trees under the COSMIC CRISP® trademark within the United States. PVM is charged with assuring the quality of WA 38 trees transferred or sold under the licensing program and with ensuring that no WA 38 trees are sold or transferred to any party that is not appropriately licensed to possess or grow them.

16. Through Plaintiffs' joint efforts, WA 38 trees and COSMIC CRISP® apples have been a commercial success.

17. PVM began granting non-exclusive licenses to growers, and selling and distributing WA 38 trees to such licensed growers in 2017. Initially, Plaintiffs planned to offer 300,000 nursery trees; however, they were met with requests for over 4 million trees. In the following three years, over 13 million WA 38 trees were lawfully planted by licensed growers.

1 18. To date, licensed growers have invested over \$500 million to grow
2 properly licensed WA 38 apple trees, and COSMIC CRISP® apples first became
3 available for public purchase in December 2019.

4 19. PVM's patent and trademark licensing efforts on behalf of WSU have
5 generated significant royalty income for both WSU and PVM. The ability to
6 generate continued royalty income from WA 38 trees depends on the strict
7 enforcement of WSU intellectual property rights, including the '210 Patent and
8 COSMIC CRISP trademark.

9 **C. Defendants' Infringing Conduct**

10 20. Defendants are in the business of asexual reproduction (also referred to
11 as propagation) and sale of fruit trees.

12 21. On information and belief, Defendants have been aware of the '210
13 Patent since shortly after it issued in February 2014. Since then Defendants' acts of
14 infringement have been willful and in disregard of the '210 Patent, without any
15 reasonable basis for believing that Defendants had a right to engage in the infringing
16 conduct.

17 22. Neither PVM nor WSU has granted any of the Defendants a license to
18 grow, asexually reproduce, sell, or offer to sell the WA 38 apple cultivar.

19 23. On information and belief, Defendants have been growing, asexually
20 reproducing, selling, and offering to sell the WA 38 apple cultivar since 2016.

1 24. In 2016, Mr. Angel contacted Rose Family Orchards LLC (“**Rose**
2 **Orchards**”) and offered to asexually reproduce WA 38 trees without a license. Rose
3 Orchards accepted the offer. Defendants then asexually reproduced the WA 38 apple
4 tree by budding and grafting existing trees in the orchard to the WA 38 variety. The
5 unlicensed WA 38 apple trees that resulted from this infringing conduct were located
6 on or about Yakima County Parcel #1714512001 at Rose Orchards, in Naches,
7 Washington.

8 25. In October, 2019, the field manager of Rose Orchards, Lucio
9 Hernandez, admitted to PVM that Rose Orchards hired Defendants to asexually
10 reproduce WA 38 apple trees without a license. Rose Orchards intended to grow
11 those trees, harvest apples from them, and consign the apples for sale.

12 26. Both Lucio Hernandez and Margie Rose, the owner of Rose Orchards,
13 informed PVM that Defendants had asexually reproduced WA 38 trees for other
14 clients in the Tieton and Naches areas of central Washington.

15 27. On or about October 30, 2019, Lucio Hernandez provided PVM with
16 three invoices Rose Orchards received from AGN, dated April 5, May 23, and
17 August 16, 2016. The invoices indicate that Rose Orchards paid AGN \$19,941.12 to
18 asexually reproduce 30,016 WA 38 apple trees (identified on the invoices as
19 “Cosmic Crisp”). The invoices are attached hereto as **EXHIBIT B**.

1 28. PVM sent Defendants a letter on October 4, 2019, to notify them that
2 their activities constituted infringement.

3 29. On November 8, 2019, Mr. Angel and AGN's payroll manager met
4 with PVM's counsel to discuss Defendants' infringement of the '210 Patent.
5 Mr. Angel admitted that AGN asexually reproduced the unlicensed WA 38 apple
6 trees at Rose Orchards. Mr. Angel represented that he would provide PVM with the
7 locations of the blocks where Defendants had previously asexually reproduced
8 unlicensed WA 38 apple trees.

9 30. Mr. Angel has not communicated with PVM since the November 8,
10 2019 meeting.

11 31. On or about January 30, 2020, PVM discovered an unlicensed block of
12 an estimated 100,000 WA 38 apple trees at a nursery in Pasco, Washington. The
13 stakes in the ground were labeled "Cosmic Crisp" and the trees matched the
14 description of the WA 38 apple tree in the '210 Patent. The property on which the
15 WA 38 apple trees were found was being leased to Mr. Angel. The owner of the
16 nursery, Clyde Brubaker, was taking care of the unlicensed WA 38 apple trees for
17 Mr. Angel. Photographs of these trees are attached hereto as **EXHIBIT C**.

18 32. On or about January 31, 2020, after being notified that PVM had
19 discovered the unlicensed WA 38 apple trees, the owner of the nursery, Clyde
20
21

1 Brubaker, began disposing of the unlicensed trees because he knew the trees were
2 unlicensed and did not want to be implicated in Defendants' unlawful conduct.

3 33. Defendants also asexually propagated WA 38 apple trees for Juan De
4 La Torre in either 2018 or 2019. In February 2020, Mr. De La Torre admitted to
5 PVM that he had paid Defendants to asexually reproduce unlicensed WA 38 apple
6 trees for him and that he had intended to grow those trees, harvest apples from them,
7 and consign the apples for sale.

8 34. Defendants have induced third parties to infringe the '210 Patent.
9 Specifically, Defendants have knowingly asexually propagated unlicensed WA 38
10 apple trees for persons/entities that then grew, sold, consigned for sale, or offered to
11 sell WA 38 apple trees and the apples harvested from WA 38 trees without a license.

12 **V. CLAIM FOR RELIEF (PATENT INFRINGEMENT)**

13 35. Plaintiffs reallege and incorporate by reference their allegations from
14 Paragraphs 1 through 34.

15 36. Defendants have directly infringed the '210 Patent through their
16 actions alleged above, in violation of 35 U.S.C. §§ 163 and 271(a).

17 37. Defendants have actively induced infringement of the '210 Patent
18 through their actions alleged above, with knowledge of the '210 Patent and
19 knowledge that their actions are encouraging infringement, in violation of 35 U.S.C.
20 §§ 163 and 271(b).

1 38. Defendants have actively contributed to the infringement of the '210
2 Patent through their actions alleged above, with knowledge of the '210 Patent and
3 knowledge that their actions are contributing to infringement, in violation of 35
4 U.S.C. §§ 163 and 271(c).

5 39. Defendants' infringing conduct was and continues to be without
6 authority, consent, or license.

7 40. Defendants infringed the '210 Patent despite an objectively high
8 likelihood that their actions constituted infringement. Defendants' infringement of
9 the '210 Patent has therefore been willful.

10 41. Plaintiffs have suffered irreparable harm, and will continue to suffer
11 irreparable harm, unless Defendants are permanently enjoined from infringing the
12 '210 Patent. Plaintiffs have no adequate remedy at law.

13 42. Plaintiffs are entitled to recover from Defendants the damages they
14 have sustained as a result of Defendants' infringing acts in an amount Plaintiffs will
15 prove at trial, but in no event less than a reasonable royalty, together with interest
16 and costs, as well as attorneys' fees, should the Court deem the case to be
17 exceptional.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment:

A. Finding that Defendants have infringed and actively induced others to infringe U.S. Plant Patent No. 24,210 and that their infringement was willful;

B. Awarding Plaintiffs damages adequate to compensate them for Defendants' infringement of U.S. Plant Patent No. 24,210 (including supplemental damages for any post-verdict patent infringement up until entry of the final judgment with an accounting as needed, together with prejudgment and post-judgment interest on the damages awarded; all of these damages to be enhanced in an amount up to treble the amount of compensatory damages pursuant to 35 U.S.C. § 284);

C. Granting preliminary and permanent injunctive relief (i) enjoining Defendants, their officers, agents, servants, employees, and attorneys, and other persons who are in active concert or participation with any of the foregoing, from further acts of infringement of the '210 Patent, and (ii) directing Defendants, their officers, agents, servants, employees, and attorneys, and other persons who are in active concert or participation with any of the foregoing, to destroy all the WA 38 plants and plant material within their possession, custody, or control;

D. Finding that this case exceptional under 35 U.S.C. § 285 and awarding Plaintiffs their reasonable costs and expenses of litigation including reasonable attorneys' fees; and

1 E. Granting such other and further relief as the Court deems just and proper.

2 **JURY DEMAND**

3 Plaintiffs demand a trial by jury of all issues so triable.

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5 EXECUTED at Yakima, Washington, this 22nd day of June, 2020.

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